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# Constitutional Law

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## OVERVIEW

During this survey period the Tenth Circuit grappled with a variety of constitutional questions. From its earnest and helpful attempt to apply and clarify the concept of flexible due process in a trilogy of government employment cases to its knee-jerk application of a century-old rule to uphold the constitutionality of a state law banning religiously motivated polygamy, the court has dealt with these issues with varying degrees of proficiency.

The cases addressed in this article cover a wide range of important constitutional issues. In addition to due process and freedom of religion, the Tenth Circuit examined the constitutionality of the Utah Drug Paraphernalia Act, the free speech protections of door-to-door public service solicitation, and the validity of Wyoming's election laws. Of special interest to Colorado, the court ruled on the constitutionality of the state's water conservancy district system and the state supreme court's attorney disciplinary procedures.

## I. THE FREE EXERCISE CLAUSE: *POTTER V. MURRAY CITY*

In *Potter v. Murray City*,[1] the Tenth Circuit rejected an opportunity to reexamine the constitutional implications of a statutory ban on all polygamy, even if entered into on the basis of a good faith religious belief. The court blindly relied upon the 1879 landmark case, *Reynolds v. United States*,[2] ignoring current free exercise clause analysis.

### A. *Facts and Tenth Circuit Decision*

The plaintiff, Royston E. Potter, was employed as a police officer for the defendant, Murray City. While employed by Murray City, Potter had two wives. The defendants "terminated plaintiff's employment because of plaintiff's religious beliefs and practices and particularly by reason of his plural marriage or cohabitation and for his failure to support, obey and defend Article III, Section 1 of the Constitution of the State of Utah."[3]

The defendants stipulated to the following facts: 1) the plaintiff's polygamy was the result of a good faith religious belief; 2) such beliefs were immune from state scrutiny; 3) neither the plaintiff's two wives nor his five children were either neglected or deprived; 4) the plaintiff's wives had consented to the plural marriages; and, 5) the plaintiff's performance as a police officer was "exemplary" and unaffected by his mul-

1. 760 F.2d 1065 (10th Cir.), *cert. denied*, 106 S. Ct. 145 (1985).
2. 98 U.S. 145 (1878).
3. Potter v. Murray City, 585 F. Supp. 1126, 1128 (D. Utah 1984).

tiple marriages.[4]

Potter brought this action under the free exercise clause of the first amendment[5] and under the Civil Rights Act.[6] He sought damages against Murray City, the city's Civil Service Commission, and Police Chief Gillen, and sought declarative and injunctive relief against the State of Utah, its Governor, and its Attorney General to declare Utah's anti-polygamy constitutional provision and statute void.[7] The district court, at the request of Utah, joined the United States as a party because the act enabling Utah to join the Union was conditioned upon a ban on polygamy.[8]

The Tenth Circuit based its decision on the fact that the Supreme Court's 1879 *Reynolds* decision upholding a conviction for bigamy over a free exercise claim has never been directly overruled.[9] The court cited a number of cases relying upon *Reynolds* to support the proposition that " '[the] activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety and general welfare.' "[10] The Tenth Circuit apparently concluded that the Supreme Court's subsequent cases are in complete accord with the *Reynolds* free exercise analysis. The court therefore deferred a reexamination of the constitutionality of a state ban on religiously motivated polygamy.

*Reynolds* stands for the idea that the free exercise clause protects only religious *beliefs* from prohibition under the states' police powers. Religiously motivated *actions* obtain no first amendment protections under *Reynolds*.[11] Although *Reynolds* was the *ratio decidendi* of *Potter*, the Tenth Circuit did appear to show some awareness of the modern trend.[12]

### B. *Discussion*

#### 1. *Reynolds v. United States*

Both the trial and appellate courts, but more emphatically the Tenth Circuit, relied upon the Supreme Court's decision in *Reynolds v.*

4. *Id.* at 1129. In addition, the parties stipulated that between 5,000 and 10,000 members of polygamous families resided in Utah; that there had been only 25 criminal prosecutions for polygamy in Utah since 1952; that there had been no criminal prosecution of the plaintiff; and that the Utah Department of Employment Security had not denied him unemployment benefits. *Id.*

5. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I.

6. *Potter*, 585 F. Supp. at 1128. 42 U.S.C. § 1983 (1982).

7. *Id.* UTAH CODE ANN. § 76-7-101 (1953) codifies the mandate of article III, § 1 of Utah's constitution by making polygamy a third-degree felony.

8. *Potter*, 585 F. Supp. at 1128. The Utah Enabling Act, Act of July 16, 1894, 28 Stat. 107 (1894).

9. 760 F.2d 1065, 1068-70 (10th Cir. 1985).

10. *Id.* at 1069 (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)). *See infra* note 18 and accompanying text.

11. *See infra* text accompanying note 15.

12. 760 F.2d at 1069 n.6.

*United States*.[13] In *Reynolds*, the Court dealt with the question of whether the free exercise clause would protect an individual from criminal conviction under a federal anti-polygamy statute when the defendant had taken a second wife with the permission of his church and in the good faith belief that it was his religious duty to do so on pain of eternal damnation.[14] In affirming the defendant's conviction, the Court espoused the belief-action dichotomy in free exercise clause analysis.[15] The Court held that while the free exercise clause provides absolute protection to individual religious *beliefs*, the government is completely unfettered by the first amendment in the regulation or prohibition of religious *actions*.[16]

The plaintiff's argument that the Supreme Court's later decisions have overruled *Reynolds* was prematurely rejected by the Tenth Circuit. While the belief-action dichotomy is still recognized, actions motivated by sincere good faith religious beliefs have been offered protection from government regulation when the regulations are not in the least restrictive form available to serve compelling state interests, thus unduly infringing upon the free exercise rights of individuals.[17] The district court did make a half-hearted attempt to apply this "least restrictive alternative-compelling interest"[18] requirement as an alternative to the belief-action dichotomy theory.[19] Almost as an afterthought, the Tenth Circuit in *Potter* declared that the state's "compelling interest" in banning polygamy is to protect the "fundamental values" of the monogamous marital relationship.[20] The court never mentioned the state's burden of *proving* a "compelling interest." The court also failed to examine the possible alternative means of protecting this alleged interest which would be less destructive to the plaintiff's religious practices.[21] The court was satisfied that monogamy is so "inextricably woven into the fabric of our society" that it was unnecessary to examine whether or not

13. 98 U.S. 145 (1878).

14. In *Reynolds*, the plaintiff proved at trial that the accepted doctrine of "the Church of Jesus Christ of the Latter Day Saints, commonly referred to as the Mormon Church, . . . [was] that the failing or refusing to practice polygamy . . . would be punished, and that the penalty . . . would be damnation in the life to come." *Id.* at 161.

15. *Id.* at 166.

16. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." 98 U.S. at 166; *cf.* Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 826 (1958) (constitutional protection of free *exercise* must, by definition, mean protection of actions taken in the practice of religious beliefs).

17. Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (state interest in regulating unemployment benefits does not outweigh religious conviction against producing weapons); *see also*, Freeman, *supra* note 16.

18. *Thomas*, 450 U.S. at 718; *see also* Bob Jones University v. United States, 461 U.S. 574, 602-04 (1983); United States v. Lee, 455 U.S. 252, 258 (1982); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); United States v. Dickens, 695 F.2d 765, 772-73 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983). *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-10 (1978).

19. L. TRIBE, *supra* note 18, at 855.

20. 760 F.2d at 1070.

21. In fact "the state defendants have not presented any empirical evidence that monogamy is superior to polygamy, nor has the Utah Legislature ever considered whether its anti-polygamy laws are wise." *Id.* at 1069.

the state could pursue alternatives less burdensome upon the plaintiff's admittedly sincere and legitimate religious belief and practice.[22]

The cases cited by the court in support of *Reynolds*[23] referred to *Reynolds* for the very limited proposition that *actions* motivated by sincere religious belief are not entirely immune from state regulation to promote health, safety and general welfare.[24] The Supreme Court's adoption of the "least restrictive alternative-compelling interest" test for determining the limited conditions under which free exercise rights may be burdened in these cases demonstrates a conscious abandonment, if not an implicit overruling, of *Reynolds*' broader holding that the free exercise clause provides no protection for religiously inspired acts.[25] At the very least, the current Supreme Court free exercise analysis required the Tenth Circuit to reexamine the polygamy issue in that light.[26] The Supreme Court's current framework for analysis requires the government to present evidence proving the existence of some compelling government interest[27] which would be substantially undermined by the granting of a narrow exemption tailored to avoid a substantial burden on the specific religious practice in question.[28] Since the defendants in *Potter* offered no evidence to support the assertion that Utah had a compelling state interest in the exclusivity of monogamy as its sole marital

22. It is interesting that the district court did discuss this possibility but found it impossible to allow a religiously based exception to Utah's polygamy prohibition that would not "engulf the prohibition itself . . . irremediably eroding the police power of the state and its compelling interest." 585 F. Supp. at 1140. The Tenth Circuit omitted any analysis weighing less harmful alternatives or balancing the competing interests.

23. In addition to the Tenth Circuit's omission of the "least restrictive alternative" arm of the Supreme Court's free exercise test, it is significant that the court affirmed without comment the district court's holding that "the question of a compelling public interest is *one of law* to be determined by the court," not one of *fact* to be proven by the state to the satisfaction of the trier of fact. 585 F. Supp. at 1142 (emphasis added). Such an analysis emasculates the requirements of *Reynolds* and is unsupported by authority. The cases make it clear that the question of compelling state interest is one of fact. The burden of proving that fact rests upon the governmental entity seeking to impinge upon the free exercise rights of an individual in furtherance of those interests. *See infra* the cases cited in note 27. The Tenth Circuit's silence on this issue leaves it unclear whether it has adopted the district court's maverick position on this question.

24. 760 F.2d at 1069-70.

25. *Bob Jones*, 461 U.S. at 603; *Lee*, 455 U.S. at 257; *Yoder*, 406 U.S. at 219-20; *Sherbert*, 274 U.S. at 403; *Dickens*, 695 F.2d at 772; United States v. Carroll, 567 F.2d 955, 957 (10th Cir. 1977) (dicta).

26. "The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause of the First Amendment. In so ruling, the Court departs from the teaching of Reynolds v. United States . . . promis[ing] that in time *Reynolds* will be overruled." *Wisconsin v. Yoder*, 406 U.S. at 247 (Douglas, J., dissenting in part). Referring to *Reynolds*, Professor Tribe has noted that "[f]ew decisions better illustrate how amorphous goals may serve to mask religious persecution . . . . The question, after *Sherbert*, must be whether the monogamy-promotion goal is sufficiently compelling, and the refusal to exempt Mormons sufficiently crucial to the goal's attainment to warrant the resulting burden on religious conscience." L. TRIBE, *supra* note 18, at 854.

27. " 'The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.' " *Bob Jones*, 461 U.S. at 603 (quoting *Lee*, 455 U.S. at 257-58); *see also*, *Thomas*, 450 U.S. at 718; *Yoder*, 406 U.S. at 215; *Sherbert*, 374 U.S. at 406.

28. *Bob Jones*, 461 U.S. at 604; *Lee*, 455 U.S. at 258-61; *Thomas*, 450 U.S. at 718-19; *Yoder*, 406 U.S. at 221; *Sherbert*, 374 U.S. at 407; *Dickens*, 695 F.2d at 772.

form,[29] and demonstrated an absolute failure to consider alternatives less harmful to the plaintiff's sincere religious beliefs and practices,[30] Potter should have been granted the summary judgment relief he requested. The longevity of the rationale for this decision by the Tenth Circuit is in doubt.

## II. FREEDOM OF SPEECH

### A. *Door-to-Door Public Interest Canvassing:* Association of Community Organizations for Reform Now (ACORN) v. Municipality of Golden

In *ACORN*,[31] a public interest group successfully challenged the constitutionality of a municipal ordinance requiring door-to-door canvassers to apply to the city council for exemptions before being permitted to canvass for support.

#### 1. Facts

ACORN is a non-profit corporation whose purpose is to organize low and middle-income people on the neighborhood level to petition for redress on issues of importance to their community.[32] Through door-to-door canvassing they solicit donations, inform people of ACORN's work, encourage the signing of petitions, and encourage membership in the organization.[33] In the fall of 1980, they planned to canvass support in the city of Golden, Colorado, for opposition to the Colorado Public Service Company's planned utility rate increase and winter disconnect policy.[34]

ACORN was aware of the existence of a Golden municipal ordinance which generally prohibited uninvited door-to-door solicitation.[35] The ordinance provided for an exemption to be granted by the city council upon its determination that such door-to-door canvassing was for charitable, religious, patriotic, or philanthropic purposes or "otherwise provide(d) a service or product so necessary to the public welfare of

29. *See supra* note 21 and accompanying text.

30. The Tenth Circuit never addressed the issue. The trial court, however, found that no religious exception to the rule could be permitted without swallowing up the prohibition of polygamy. The court appeared to fear that "[t]he gate would be open . . . to everyone who might desire more than one wife at a time" leading to the demise of monogamy through "the false assertion of religious motivation for physical gratification." 585 F. Supp. at 1139.

31. 744 F.2d 739 (10th Cir. 1984).

32. *Id.*

33. *Id.*

34. *Id.* at 742.

35.

> "It is illegal for any person, firm or corporation . . . to solicit or have solicited in its name money, donations of money or property, or financial assistance of any kind; or to conduct polls, opinion samples or other informational canvassing from house to house or from business to business within the city limits unless so invited or requested by the owners or occupants of the house or business."

*Id.* at 741-42 n.1 (quoting GOLDEN MUN. CODE § 4.44.010 (1974)).

the residents of the city" that it could not be considered a nuisance.[36] No other decision-making criteria were delineated by the ordinance. Groups seeking exemptions were to file written applications with the city containing, among other things, the purpose for the canvassing and the intended use of the funds solicited.[37] Violation of the ordinance was a misdemeanor.[38]

After consulting counsel, ACORN decided not to apply for the exemption. ACORN maintained that their activities did not fall within the activities qualifying for exemption and that the requirement of an application for an exemption abridged their first amendment rights.[39] ACORN sent the city a letter informing it of the date of the canvass, and providing a list of the canvassers, a description of ACORN's program, and its Colorado certificate of registration.[40] The canvassing went forward on November 5, 1980, as planned, and the following day the Golden police told the canvassers to cease and desist and issued several citations.[41] The canvassing stopped shortly thereafter and ACORN brought suit in federal district court against the city of Golden and the Golden Police Department under sections 1983 and 1988 of the Civil Rights Act, and under the first and fourteenth amendments, seeking to enjoin enforcement of the ordinance.[42]

The trial court found for the defendants.[43] The court reasoned that since it was likely that ACORN would have been granted an exemption

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36. "Exemptions. The provisions of this chapter shall not apply to persons and organizations granted exemptions. The city manager shall issue exemptions to persons and organizations after the city council has determined that such solicitation . . . [or polling] . . . is [for a] charitable, religious, patriotic or philanthropic purpose or otherwise provides a service or product so necessary for the general welfare of the residents of the city that such activity does not constitute a nuisance to the residents of the city."

744 F.2d at 742 n.1 (quoting GOLDEN MUN. CODE § 4.44.020 (1974)).

37. "In order to obtain an exemption as provided for in this chapter, the applicant shall file with the city manager a sworn application in writing containing the following information:

A. The applicant's name and the names and addresses of officers and directors of such applicant;

B. The name and purpose of the cause for which the exemption is sought and the specific anticipated use of the proceeds or information;

C. The method whereby the goods or services are to be sold and delivered, donations solicited or polls conducted;

D. The time period during which the solicitation, peddling or polling is to be carried on;

E. Whether or not any commissions, fees, wages or emoluments are to be expended in connection with such solicitation, peddling or polling, and the amounts thereof."

744 F.2d at 742 n.1 (quoting GOLDEN MUN. CODE § 4.44.030 (1974)).

38. "Any person violating the provisions of this chapter is guilty of a misdemeanor and . . . shall be subject to a fine of not less than ten dollars, nor more than one hundred dollars." *Id.* (quoting GOLDEN MUN. CODE § 4.44.040).

39. 744 F.2d at 742.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 744.

had it applied for one, the only question to be decided was whether an ordinance requiring an application for an exemption for door-to-door canvassing was unconstitutional on its face.[44] The district court stressed that although the ordinance could be characterized as vague and indefinite, it was not unconstitutional because it was the city council and not the police who made the decision as to which groups received exemptions.[45]

2. The Tenth Circuit Decision

The Tenth Circuit, Judge Holloway writing, overturned the lower court's ruling, finding the ordinance unconstitutionally vague on its face and an unjustifiable "time, place, and manner" restriction on the plaintiffs' first amendment rights.[46]

The city's argument that ACORN never applied for an exemption and had therefore never been denied an exemption from the ordinance brought the issue of ripeness before the Tenth Circuit. The court held that the denial of an exemption was unnecessary in a facial challenge to a law alleged to violate the first amendment.[47] The Tenth Circuit also acknowledged that the Supreme Court has held that when faced with a law requiring the acquisition of a permit or license as a prerequisite to exercising the first amendment right of free speech, an individual or group is free to ignore the prerequisite.[48]

The Tenth Circuit also found that the language of the ordinance setting out the grounds for an exemption was impermissively vague. Unlike the district court, the majority's concern for the imprecision of the ordinance was not assuaged by the fact that the decision to grant or deny a permit was made by the Golden City Council instead of by the police.[49] The court held that vague and imprecise laws regulating free expression give municipal officials the "unguided discretion" to arbitrarily decide which groups are entitled to exercise their first amendment rights.[50]

The Supreme Court has found public service solicitation, as practiced by ACORN in this case, to be protected under the first amendment.[51] Laws licensing or permitting first amendment rights of free

44. *Id.* at 743-44.

45. *Id.* at 743.

46. *Id.* at 750 (McWilliams, J., dissenting). Judge McWilliams agreed with the trial court.

47. 744 F.2d at 744.

48. *Id. See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969); Jones v. Opelika, 316 U.S. 584, 602 (1942)(Stone, J., dissenting), *vacated*, 319 U.S. 103 (1943); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

49. 744 F.2d at 747.

50. *Id.*

51. Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) (25% expense limit ordinance vacated); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (75% charitable use of funds ordinance vacated); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (advance notice of political canvassing ordinance vacated); *see also* ACORN v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983) (canvassing and soliciting clearly protected by first amendment).

expression have always been carefully scrutinized.[52] The Court has required such laws to be narrowly drawn so as to effectuate compelling government interests with a minimum of adverse effect on first amendment rights.[53] The Tenth Circuit found Golden's anti-solicitation ordinance overly broad in general, but took special exception to the ambiguous drafting of the exemption section.[54] This section provided insufficient procedures and decision-making criteria with which to guide the council and to prevent arbitrariness in the exemption granting process.[55] The Tenth Circuit found the city's case-by-case method to be "precisely the sort of discretionary process that the Supreme Court has condemned."[56]

Golden's final defense was that the ordinance was a reasonable "time, place, and manner" restriction serving a legitimate government interest.[57] A reasonable "time, place, and manner" restriction is one which is content neutral, narrowly tailored to serve important government interests, and leaves open ample and adequate alternate means for dissemination of the message.[58] The Supreme Court has also found that free speech may not be denied in one place merely because there are alternate forums for expression in existence elsewhere.[59] Although alternative, more expensive, and perhaps less effective forms were available to ACORN, a denial of an exemption would have silenced its primary means of disseminating its message. Granting exemptions for organizations which the council found charitable, scientific, or "necessary for the general welfare" required an impermissible inquiry into the content of the applicant's message.[60] Such a requirement is not content neutral, and as such was an unconstitutional "time, place, and manner" restriction.[61] Therefore, the Tenth Circuit's rejection of Golden's ordinance is in harmony with recent Supreme Court decisions.[62]

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52. *Munson*, 467 U.S. 947; NAACP v. Button, 371 U.S. 415 (1963) (attorney regulation prohibiting encouragement of racial discrimination suits overbroad); Thornhill v. Ala., 310 U.S. 88 (1940) (anti-picketing ordinance overbroad); Schneider v. N. J., 308 U.S. 147 (1939) (anti-leafletting ordinance overbroad); Strasser v. Doorley, 432 F.2d 567 (1st Cir. 1970) ("newsboy" licensing ordinance overbroad); Natco Theatres v. Ratner, 463 F. Supp. 1124 (S.D.N.Y. 1979) (Movie theater licensing ordinance overbroad).

53. *Button*, 371 U.S. 415.

54. 744 F.2d at 748.

55. Indeed, examples of past grants and denials of exemptions showed a lack of procedural continuity and a penchant for arbitrary decisions. *See* 744 F.2d at 748 nn.6 & 7.

56. 744 F.2d at 749 (citing *Munson*, 467 U.S. at 959 n.12).

57. *Id. See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967); Adderly v. Fla., 385 U.S. 39 (1966).

58. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984); National Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 723 (7th Cir. 1984).

59. *Schneider*, 308 U.S. at 163.

60. 744 F.2d at 749.

61. *Id.* at 750. *See* Carey v. Brown, 447 U.S. 455, 461 (1980) (regulation of speech in a public forum must be narrowly drawn to serve substantial state interests); Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972) (first amendment denies government the power to restrict expression due to content).

62. Regan v. Time, Inc., 104 S. Ct. 3262, 3265 (1984) (prohibiting reproduction of currency in a newsmagazine is unconstitutional restriction due to content); *Carey* 447 U.S. at 461-62.

B. *Drug Paraphernalia Laws:* Murphy v. Matheson

In *Murphy v. Matheson*,[63] Murphy, the owner of a "head shop," brought a pre-enforcement challenge to the Utah Drug Paraphernalia Act,[64] seeking to enjoin enforcement of the Act and also seeking a declaratory judgment that the Act was unconstitutional.[65] Murphy's claims under the first and fourteenth amendments of the United States Constitution were, first, that the Act's overly broad language unconstitutionally restricted the free flow of commercial and non-commercial speech and, second, that the Act's vagueness and its forfeiture-without-hearing clause violated due process protections.[66]

1. Facts

The Utah Legislature enacted the Utah Drug Paraphernalia Act in 1981 in an attempt to combat drug use.[67] The Act first defined drug paraphernalia as any physical object used or intended to be used at any stage in the illicit controlled substance use process, from inception to ingestion.[68] It also included a non-exclusive list of such items for illustrative purposes.[69] The next section listed "logically relevant factors" for the trier of fact to consider in determining whether or not an object was "drug paraphernalia."[70] The Act made it a criminal offense to possess or use drug paraphernalia or to knowingly deliver or advertise drug

63. 742 F.2d 564 (10th Cir. 1984).

64. UTAH CODE ANN. §§ 58-37a-1 to 37a-6 (Supp. 1985).

65. 742 F.2d at 567.

66. *Id.*

67. "It is the intent of this chapter to discourage the use of narcotics by eliminating paraphernalia designed for processing, ingesting, or otherwise using a controlled substance." UTAH CODE ANN. § 58-37a-2 (Supp. 1985).

68.

> As used in this chapter . . . "Drug paraphernalia" means any equipment, product or material used, or intended for use, to plant, propagate, test, analyze, package, repackage, store, contain, conceal, inject, ingest, inhale, or to otherwise introduce a controlled substance into the human body in violation of chapter 37, title 58, and includes, but is not limited to: [a list of twelve types of items].

UTAH CODE ANN. § 58-37a-3 (Supp. 1985).

69. *Id.*

70.

> In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:
>
> (1) Statements by an owner or by anyone in control of the object concerning its use;
>
> (2) Prior convictions, if any of an owner, or of anyone in control of the object, under any state or federal law relating to a controlled substance;
>
> (3) The proximity of the object, in time and space, to a direct violation of this chapter;
>
> (4) The proximity of the object to a controlled substance;
>
> (5) The existence of any residue of a controlled substance on the object;
>
> (6) Instructions whether oral or written, provided with the object concerning its use;
>
> (7) Descriptive materials accompanying the object which explain or depict its use;
>
> (8) National and local advertising concerning its use;
>
> (9) The manner in which the object is displayed for sale;
>
> (10) Whether the owner or anyone in control of the object is a legitimate

paraphernalia.[71] Finally, the Act declared that no property rights could exist in these items, eliminating any need for a hearing before or after their taking.[72] Therefore, the district court found the statute constitutionally sound in all of the challenged areas and the plaintiff appealed.

2. The Tenth Circuit Decision

The plaintiff asserted that the Act's ban on advertising drug paraphernalia[73] unconstitutionally restricted the free flow of commercial speech.[74] He further argued that even if his individual conduct were not protected, the overbreadth doctrine allowed him to assert the rights of others whose first amendment rights could be substantially infringed by the Act.[75] The Tenth Circuit, Judge Holloway writing, held that the overbreadth exception to standing requirements did not apply in commercial speech cases.[76] The court noted that the chilling effect on a

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supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(11) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) The existence and scope of legitimate uses of the object in the community; and

(13) Expert testimony concerning its use.

UTAH CODE ANN. § 58-37a-4 (Supp. 1985).

71.

(1) It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor.

(2) It is unlawful for any person to deliver, or possess with intent to deliver, or manufacture with intent to deliver, any drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body in violation of this act. Any person who violates this subsection is guilty of a class A misdemeanor.

(3) Any person 18 years of age or over who delivers drug paraphernalia to a person under 18 years of age who is three years or more younger than the person making the delivery is guilty of a third degree felony.

(4) It is unlawful for any person to place in this state in any newspaper, magazine, handbill, or other publication any advertisement, knowing that the purpose of the advertisement is to promote the sale of drug paraphernalia. Any person who violates this subsection is guilty of a class B misdemeanor.

UTAH CODE ANN. § 58-37a-5 (Supp. 1985).

72. "Drug paraphernalia is subject to seizure and forfeiture and no property right can exist in it." UTAH CODE ANN. § 58-37a-6 (Supp. 1985).

73. UTAH CODE ANN. § 58-37a-5(4) (Supp. 1985). *See supra* note 71.

74. 742 F.2d at 567.

75. *Id. See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (third-party overbreadth challenge of charitable solicitation ordinance); Broadrick v. Okla., 413 U.S. 601, 610-12 (1973) (third-party overbreadth challenge of state employee anti-partisan politics statute).

76. 742 F.2d at 568 (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982) (overbreadth doctrine doesn't apply to commercial speech); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 565 n.8 (1980) (overbreadth doctrine not applicable to electric utility advertising); Bates v. State Bar, 433 U.S. 350, 381 (1977) (not applicable to attorney advertising); Stoianoff v. Mont., 695 F.2d 1214, 1224 (9th Cir. 1983) (not applicable to drug paraphernalia advertising); New Eng-

third party's exercise of free speech has been held unlikely to occur in the commercial speech area because the strong profit motive involved will resist regulatory restraints.[77] The Tenth Circuit therefore concluded that the plaintiff had no standing to make a facial challenge to the statute by asserting the commercial speech rights of others.[78]

The court also rejected the plaintiff's first amendment claims made on his own behalf. The court relied primarily on the Supreme Court's reasoning in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[79] which upheld a village ordinance regulating the sale of smoking accessories displayed within close proximity to literature encouraging the use of controlled substances. The Tenth Circuit concluded that such speech was speech proposing an illegal transaction and therefore was not protected by the first amendment.[80] Any effect the ban may have had on legitimate commercial speech was held to be minimal.[81] A statute must substantially infringe upon first amendment rights in order to be found unconstitutionally overbroad.[82] "That some unconstitutional applications of the law can be imagined is insufficient to invalidate the statute on overbreadth grounds."[83]

The Tenth Circuit also rejected the plaintiff's claim that the Act was void for vagueness in violation of due process.[84] Laws carrying criminal penalties may be challenged as unduly vague.[85] Criminal violations must be clearly defined so that a person of ordinary intelligence has a reasonable opportunity to be informed as to what conduct is prohibited. They must also provide explicit standards to prevent arbitrary and capricious enforcement.[86] The Tenth Circuit examined the Utah Drug Paraphernalia Act for vagueness in terms of whether the language of the statute was sufficient to provide fair notice and fair enforcement.

Murphy based the "fair notice" prong of his vagueness attack upon section 3 of the Act which defines drug paraphernalia as "any . . . product . . . used, *or intended for use* to . . . grow, . . . manufacture, . . . [or]

land Accessories Trade Ass'n v. City of Nashua, 679 F.2d 1, 4 (1st Cir. 1982) (not applicable to drug paraphernalia advertising)).

77. 742 F.2d at 568 (citing *Central Hudson*, 447 U.S. at 565 n.8; *Bates*, 433 U.S. at 381).

78. 742 F.2d at 568.

79. 455 U.S. 489, 495-96 (1982).

80. 742 F.2d at 568; *see also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (discrimination in help-wanted ads); Camille Corp. v. Phares, 705 F.2d 223, 227 n.2 (7th Cir. 1983) (drug paraphernalia ads); Florida Businessmen for Free Enter. v. City of Hollywood, 673 F.2d 1213, 1217 (11th Cir. 1982) (drug paraphernalia ads); Casbah, Inc. v. Thone, 651 F.2d 551, 564 (8th Cir. 1981) (drug paraphernalia ads), *cert. denied*, 455 U.S. 1005 (1982). It is interesting to note, however, that the court did not impose the imminent threat standard here, as it did in National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1983) (advocating illegal conduct at some indefinite future time is not regulable).

81. 742 F.2d at 569.

82. *Schaumburg*, 444 U.S. at 634; Weiler v. Carpenter, 695 F.2d 1348, 1350 (10th Cir. 1982).

83. 742 F.2d at 569 (citing *Broadrick*, 413 U.S. at 618; Pennsylvania Accessories Trade Assoc., Inc. v. Thornburgh, 565 F. Supp. 1568, 1572 (M.D. Pa. 1983)).

84. 742 F.2d at 569.

85. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972).

86. 408 U.S. at 108-09.

ingest . . . a controlled substance."[87] The court admitted that taken in isolation the "intended for use" language was ambiguous as to whether the *mens rea* requirement of intent applied to the person charged with the crime of possessing or delivering the forbidden articles or to the state of mind of someone else in the chain of possession or delivery.[88] The court found that this deficiency was cured because, when the statute is read as a whole, it becomes clear that the intention must be linked to the party accused of performing the illegal act.[89]

The Tenth Circuit held that this "scienter" requirement saved the statute from being unconstitutionally vague.[90] The vagueness of a criminal statute may be cured if it includes a requirement that the violator knows that what he does is illegal or probably illegal.[91] However, the Tenth Circuit, in reading in such a high scienter requirement while validating the Act, actually has rendered it virtually unenforceable. The paraphernalia vendor can simply argue that he had no intention for his inventory to be used illegally. It seems that the primary intention of the seller of paraphernalia (or any other wares for that matter) is for the customer to buy it so that the seller makes a profit. It is impossible for the seller of any product to know whether or not the buyer intends to use it for a lawful purpose.[92]

The court also found that some of the "logically relevant factors"[93] provided to guide law enforcement officials were vague, but, when taken as a whole, provided objective criteria to enable police to evaluate particular circumstances.[94] Admitting that even law enforcement officials are confused by the "logically relevant factors," the court held that the issue of arbitrary enforcement was not ripe for decision.[95] In pre-enforcement challenges for vagueness, the main thrust of the court's inquiry is the notice requirement.[96]

The Tenth Circuit found section 6 of the Act[97] an unconstitutional taking of property without provision for a hearing, a violation of the due process clause of the fourteenth amendment. Section 6 made drug paraphernalia subject to seizure and forfeiture with no legal means of redress by the owner.[98] Although section 6 declared that "no property right can exist" in drug paraphernalia, the court found that "sellers of alleged drug paraphernalia have a vital property interest in their

87. *See supra* note 68 (emphasis added).
88. 742 F.2d at 570.
89. *Id.* at 570-71.
90. *Id.* at 573.
91. *Id.* (citing Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 87 n.98 (1960)).
92. For example, could a gun dealer who sells "Saturday Night Specials" ever be charged with intending them to be used in committing crimes? Such a result is unlikely to become the law.
93. UTAH CODE ANN. § 58-37a-4 (Supp. 1985).
94. 742 F.2d at 574.
95. *Id.*
96. *Flipside*, 455 U.S. at 503.
97. *See supra* note 72.
98. 742 F.2d at 574.

inventories."[99]

Seizure of property before notice and a hearing is permissible under limited circumstances,[100] but the requirements of due process are violated by a statute permitting the seizure and forfeiture of property without providing for any notice or hearing.[101] While the seizure and forfeiture section of the statute was found unconstitutional, the Tenth Circuit found that it could be severed from the rest of the Act, which had been held constitutional.[102]

## III. Due Process: Termination of Government Employees

In a trio of cases, the Tenth Circuit examined the constitutional interests implicated and due process protections required in dismissing government employees.

### A. *Military Employment and Homosexuality:* Rich v. Secretary of the Army

In *Rich v. Secretary of the Army*,[103] the plaintiff, Rich, brought suit challenging his honorable discharge from the Army for fraudulent enlistment. Rich was charged with deliberately concealing and misrepresenting his homosexuality on his reenlistment forms, and prior statements he had made to his superiors were given as evidence in support of this allegation.[104]

The Tenth Circuit, in an opinion authored by Judge Holloway, affirmed the decision of the trial court denying Rich's request for reinstatement. The court first agreed that the Army's charge that Rich had concealed and fraudulently misrepresented his homosexuality on the enlistment forms was reached in accordance with Army regulations which were neither arbitrary nor capricious, and was supported by the substantial evidence of Rich's own admissions.[105] The court then proceeded to Rich's constitutional arguments.

#### 1. Procedural Due Process

The Army procedures for discharging personnel for fraudulent entry do not require a hearing; Rich claimed that his discharge was therefore a violation of due process.[106] A litigant must show that he has been deprived of a protected liberty or property interest before he can claim

99. 742 F.2d at 577.

100. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht used for smuggling drugs); *see also Casbah*, 651 F.2d at 562 (seizure of drug paraphernalia).

101. 742 F.2d at 577; *see also* Windfaire, Inc. v. Busbee, 523 F. Supp. 868, 872 (N.D. Ga. 1981) (provided post-seizure notice and hearing).

102. 742 F.2d at 578 (forfeiture clause "not so interwoven with the remainder of the statute that the other portions of the Act cannot stand alone").

103. 735 F.2d 1220 (10th Cir. 1984).

104. 516 F. Supp. 623 (D. Colo. 1981).

105. 735 F.2d at 1225.

106. *Id.* at 1226.

the protections of procedural due process.[107] The court, relying on *Board of Regents v. Roth*[108] and *Asbill v. Housing Authority of the Choctaw Nation*,[109] held that in order to be considered a property interest for procedural due process purposes, the plaintiff must have a "legitimate claim of entitlement" and not just an abstract desire to continue in his position of employment.[110] The Tenth Circuit held that, because the Army has the power to promulgate procedures for discharging personnel and had complied with those procedures, the plaintiff had no legitimate claim of entitlement to his job: he had "no property interest in the continuance of his Army Career."[111]

The court next rejected Rich's contention that he had been deprived of a protected liberty interest without a hearing.[112] Rich claimed that as a result of his discharge he had been unable to receive unemployment benefits or obtain alternative employment.[113] The federal courts have recognized a protected liberty interest in one's reputation[114] and freedom to take advantage of alternative means of employment.[115] The Tenth Circuit limited redress for deprivation of these liberty interests, however, by making recovery contingent upon proof that the harm to plaintiff's reputation and future career had resulted from defendant's " '*publication* of information which was *false* and stigmatizing.' "[116]

The court found that the Army did not publicize the grounds of plaintiff's dismissal and only released the information to the Colorado Department of Employment at the plaintiff's request.[117] Therefore, there was no deprivation of a liberty interest which would have entitled Rich to a hearing.[118]

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107. Board of Regents v. Roth, 408 U.S. 564 (1972) (no property interest in non-tenured teaching position); Perry v. Sinderman, 408 U.S. 593 (1972) (implied property interest in non-tenure teaching system).

108. 408 U.S. 564 (1972) (non-tenured professor had no claim of entitlement).

109. 756 F.2d 1499 (10th Cir. 1984) (employee of Housing Authority had no claim of entitlement in continued employment).

110. 735 F.2d at 1226.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Roth*, 408 U.S. 564; Wisconsin v. Constantineau, 400 U.S. 433 (1971) (reputation interest affected by posting notice forbidding sale of liquor to claimant); *cf.* Paul v. Davis, 424 U.S. 693 (1976) (no reputation interest affected by distribution of photo indentifying claimant as shoplifter).

115. *Roth*, 408 U.S. 564; Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983) (assistant police chief stigmatized by public dissemination of reasons for firing).

116. 735 F.2d at 1227 (quoting *Asbill*, 756 F.2d at 1503 (emphasis in original)).

117. *Id. See also* Marwill v. Baker, 499 F. Supp. 560 (E.D. Mich. 1980) (no deprivation of liberty interest where publication of information is made by plaintiff or at his insistance).

118. Refusing to rule on whether homosexuality was either a constitutionally protected privacy interest or a suspect class for equal protection purposes, the court held that the government had an overriding interest in keeping the armed services heterosexual. 735 F.2d at 1228-29.

2. Substantive Due Process: Privacy

Following the district court,[119] the Tenth Circuit also relied heavily upon *Beller v. Middendorf*[120] in denying the plaintiff's substantive due process claim.[121] The court focused on the military's special need to maintain a way of life different and separate from civilian life in considering the merits of Rich's claim.[122]

The court skirted the issue of whether or not homosexuality is protected by the constitutional right to privacy.[123] The courts are divided on this issue.[124] The Tenth Circuit held that, even assuming *arguendo* that homosexuality was a protected privacy interest, the government had an overriding interest in keeping the armed services heterosexual.[125]

3. First Amendment

Rich further argued that the Army's policy prohibiting homosexuality infringed upon his first amendment rights to associate, discuss personal issues, or speak out for change of the system.[126] The Tenth Circuit dismissed these arguments by explaining that Rich had been discharged for falsifying enlistment forms regarding his sexual practices, not for gay advocacy or or associating with homosexuals.[127] Relying upon *Brown v. Glines*[128] and *Parker v. Levy*,[129] the court found that whatever "incidental effect . . . the Army [regulations had] upon First Amendment rights is entirely justified by the special needs of the military."[130]

B. *Civilian Employees:* Walker v. United States

*Walker v. United States*[131] also dealt with falsifying information on employment forms. However, in *Walker* the plaintiff was a probationary civilian employee of the military.[132] He received notice that he was to

119. 516 F. Supp. at 625.

120. 632 F.2d 788 (9th Cir. 1980) (discharge of Navy personnel for homosexuality is not a denial of due process), *cert. denied sub nom.* Beller v. Lehman, 452 U.S. 905 (1981).

121. Rich argued that his military record proved there was no rational connection between his sexual orientation and his suitability for service. 735 F.2d at 1227.

122. *Id.* at 1227 n.7.

123. *Id.* at 1228.

124. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (anti-sodomy law upheld), *aff'd mem.*, 425 U.S. 901 (1976); De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (no homosexual constitutional protection from employment discrimination); Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976) (no right to privacy protection from anti-sodomy law for married couple if third party present); *cf.* New York v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980) (anti-sodomy law invalid as to consensual acts between adults), *cert. denied*, 451 U.S. 987 (1981).

125. 735 F.2d at 1228.

126. *Id.*

127. *Id.* at 1229.

128. 444 U.S. 348 (1980) (circulating petitions on Air Force bases).

129. 417 U.S. 733 (1974) (Army physician called for blacks to refuse to serve in Vietnam).

130. 735 F.2d at 1229.

131. 744 F.2d 67 (10th Cir. 1984).

132. *Id.* at 68.

be dismissed on the ground that he had falsified his employment application. He was given five days to respond before his termination.[133] Despite Walker's written and oral denials of the allegations of falsification, which were the only means of participation he was allowed in the proceedings, the government found that the charges were supported by substantial evidence and dismissed him.[134] Walker brought suit claiming that he had been deprived of liberty and property interests protected by the due process clause.[135]

As in *Rich*, the Tenth Circuit held that the due process right to be heard in a meaningful time and manner is only mandated when the liberty or property interest of an individual has been adversely affected.[136] Following *Board of Regents v. Roth*,[137] the court found that as a probationary employee, Walker did not have a sufficient entitlement to government employment for his employment to qualify as a property interest deserving the protections of procedural due process.[138]

In contrast to *Rich*, however, the court found that, because Walker had been dismissed on the grounds of lying on his employment application, his valuable liberty interest in his "good name, reputation and integrity, and . . . freedom to take advantage of other employment opportunities"[139] had been implicated. Relying on *Miller v. City of Mission*,[140] the Tenth Circuit found that federal personnel procedures[141] which allowed disclosure of plaintiff's personnel file (containing the reasons for his dismissal) to other federal and state agencies was both a public dissemination of stigmatizing information and a barrier to his securing future federal employment.[142] It is notable that the Tenth Circuit did not take the opportunity to explain its denial of a similar reputation-based liberty interest in *Rich*. However, *Rich* can be distinguished by the fact that Rich had requested the dissemination of his personnel records to the Colorado Department of Employment,[143] whereas in *Walker* the government had released the plaintiff's personnel records to the State of Oklahoma and federal agencies without his permission.[144]

The Tenth Circuit rejected the defendant's argument that Walker was not stigmatized by the release of his records because he could chal-

133. *Id.*

134. *Id.*

135. U.S. CONST. amend. V.

136. 744 F.2d at 68. *See* Mathews v. Eldridge, 424 U.S. 319 (1976), Armstrong v. Manzo, 380 U.S. 545 (1965).

137. 408 U.S. 564 (1972).

138. 744 F.2d at 68.

139. *Id.* at 69.

140. 705 F.2d 368 (10th Cir. 1983) (public dissemination of reasons for assistant police chief's firing).

141. Federal Personnel Manual, ch. 294, subch. 7-2-b (February 6, 1976); 5 C.F.R. § 294.702(c) (1983).

142. 744 F.2d at 69.

143. *See supra* text accompanying note 117.

144. 744 F.2d at 69.

lenge the basis for his dismissal in a state administrative hearing.[145] The court found that Walker was entitled to procedural safeguards at the time of his dismissal in order to avoid the stigma. "Appellant should not be forced to reestablish his innocence every time he applies for benefits or a job."[146]

The court then turned to the question of what process was due. *Miller* requires that notice of the charges must be given a reasonable time before a hearing in order to give the individual a meaningful opportunity to be heard.[147] *Miller* further requires that, except in extremely unusual situations, the individual must be given a *pretermination* hearing in order to be afforded a meaningful time within which to be heard.[148]

The Tenth Circuit found several defects with the termination procedures employed against Walker. While not requiring a formal trial-type proceeding, the Tenth Circuit held that Walker should have been given the opportunity to confront the person or persons who alleged that he had lied on his employment application.[149] The court also found that the five days notice did not give the plaintiff adequate time to prepare his defense.[150] In addition, the fact that the plaintiff's response to the charges was heard by the same office which had made the initial decision to terminate him led the court to conclude that this office could not be the "impartial tribunal" required by the Constitution.[151] In light of the important liberty interests at stake, the court held that the government had not complied with the requirements of procedural due process.[152]

### C. *Probationary Civil Service Employees:* Sipes v. United States

The plaintiff in *Sipes v. United States*[153] alleged that his termination as a preservation packager at an Air Force base was in retaliation for his exercise of free speech.[154] Sipes had complained to the Inspector General about what he maintained were discriminatory citations for infractions given by his superiors. Sipes further argued that his dismissal arbitrarily deprived him of protected liberty and property interests in violation of due process.[155]

If a Civil Service employee is discharged before working a full year, he is not entitled to a pretermination hearing and other discharge proce-

145. *Id.* at 70. In fact Walker did challenge the allegation in front of the Oklahoma Unemployment Commission successfully.
146. *Id.*
147. 705 F.2d at 372.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 71.
152. *Id.*
153. 744 F.2d 1418 (10th Cir. 1984).
154. Sipes got his job pursuant to the Vietnam Era Veterans Readjustment Act, Pub. L. No. 93-508, 88 Stat. 1578 (1974) (codified at 38 U.S.C. §§ 101-5228 (1983)).
155. 744 F.2d at 1419.

dures afforded permanent, nonprobationary employees.[156] Again, the Tenth Circuit, Judge Holloway writing, held that Sipes was required to demonstrate that he had a liberty or property interest in continued employment before he could gain the protections of procedural due process. Otherwise he must accept the procedures provided by statute or regulation. The court held that, in this case, these procedures had been complied with by the government.[157]

Relying again on *Board of Regents v. Roth*[158] and, more specifically, *Walker v. United States*,[159] the court found that Sipes did not have a sufficient claim of entitlement to his employment to create a property interest protected by procedural due process.[160] The court rejected Sipes' assertion that the goals behind the Vietnam Era Veterans Readjustment Act (VEVRA) created an entitlement.[161]

The court also rejected Sipes' claim that his dismissal and consequent ejection from the VEVRA program deprived him of a liberty interest in his livelihood. Citing *Asbill v. Housing Authority of the Choctaw Nation*[162] and *Rich v. Secretary of the Army*,[163] the court held that Sipes had failed to show that his termination had stigmatic consequences resulting from the publication of substantially false characterizations of the reasons for his termination.[164] The court found both that the government had not made public any information concerning Sipes' termination and that the reasons given for his dismissal were not stigmatizing.[165]

The Tenth Circuit's procedural due process analysis demonstrated a judicial desire to keep clear of mundane personnel decisions made by administrative agencies. The court's handling of Sipes' first amendment claims also reflects this attitude. Sipes claimed that he was terminated for complaining to the Inspector General about being discriminatorily cited for infractions by his superiors. Following the Supreme Court in *Connick v. Myers*,[166] the Tenth Circuit held that such communications by a public employee are not expressions of opinion on matters of public concern. The Tenth Circuit further held that the first amendment does not require the court to look carefully into the discretion used by government officials in making personnel management decisions. Apparently, in government personnel manners, the court will not strictly scrutinize what may be retaliations for expressions of personal concerns.[167]

156. *Id.* at 1420 (citing 5 U.S.C. § 4303(f) (1983)).
157. *Id.*
158. 408 U.S. 564 (1972). *See supra* note 107 and accompanying text.
159. 726 F.2d 1499 (10th Cir. 1984). *See supra* note 138 and accompanying text.
160. 744 F.2d at 1421.
161. *Id.*
162. 726 F.2d 1499 (10th Cir. 1984).
163. 735 F.2d 1220 (10th Cir. 1984).
164. 744 F.2d at 1421-22. The government did not "call into question the plaintiff's good name, reputation, honor, and integrity." *Id.* at 1422.
165. *Id.* at 1423.
166. 461 U.S. 138 (1983) (assistant district attorney fired after opposing a transfer and circulating a questionnaire on department policy).
167. 744 F.2d at 1423.

## IV. ATTORNEY DISCIPLINARY PROCEDURES AND DUE PROCESS: *RAZATOS V. COLORADO SUPREME COURT*

### A. *Facts*

In *Razatos v. Colorado Supreme Court*,[168] the plaintiff, Razatos, sought a declaratory judgment that Colorado Rule of Civil Procedure 252,[169] violated the due process clause of the fourteenth amendment.[170] Rule 252 governs the procedures of an attorney disciplinary hearing before the Colorado Supreme Court.

Grievances filed against Razatos[171] were heard by a three-member Hearings Committee according to Rule 249.[172] The Committee recommended that Razatos' license to practice law be suspended for three years.[173] The Committee's findings were approved by a Hearing Panel which prepared a report which was adopted by the Colorado Supreme Court.[174] After Razatos' request for rehearing was denied he appealed to the United States Supreme Court, but his appeal was denied.[175]

### B. *The District Court Decision*

Razatos then brought suit in United States District Court. The district court held that since the jurisdiction for discipline of Colorado attorneys lies with the Colorado Supreme Court and the United States Supreme Court (the only court with appellate jurisdiction over the highest court in the state), the district court lacked original jurisdiction over Razatos' claim. In addition, the district court felt that federal district courts lack subject matter jurisdiction over these matters.[176] Because the district court found that Razatos failed to raise a federal question, the court declined to hold that the disciplinary procedure outlined in Rule 252 violated due process.[177]

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168. 746 F.2d 1429 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2019 (1985).

169. The attorney disciplinary rules, COLO. R. CIV. P. 241-59, were repealed effective January 1, 1982. They were replaced by COLO. R. CIV. P. 241.1-.25. 746 F.2d at 1431 n.1. COLO. R. CIV. P. 252 was reenacted as COLO. R. CIV. P. 241.20.

170. U.S. CONST. amend. XIV.

171. Razatos was both a real estate broker and an attorney. The disciplinary hearings arose over a transaction in which Razatos represented a client in the purchase of a bar. The issue was whether Razatos was adequately representing his client in the capacity of an attorney, or whether he was merely acting as a real estate broker. 746 F.2d at 1431 (citing plaintiff's amended complaint).

172. The Hearings Committee holds a formal hearing in which witnesses are sworn and a complete record is developed. The Committee report is submitted to a nine-man Hearings Panel. If a majority of the panel approves a report finding wrong-doing, the panel makes recommendations to the Colorado Supreme Court for appropriate disciplinary action. COLO. R. CIV. P. 249.

173. 549 F. Supp. 798, 799 (D. Colo. 1982), *aff'd*, 746 F.2d 1429 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2019 (1985).

174. People v. Razatos, 636 P.2d 666 (Colo. 1981), *appeal dismissed sub nom.* Razatos v. Colorado Supreme Court, 455 U.S. 930 (1982).

175. Razatos v. Colorado Supreme Court, 455 U.S. 930 (1982) (appeal dismissed for lack of a substantial federal question).

176. 549 F. Supp. at 801.

177. *Id.*

C. *The Tenth Circuit Decision*

Writing for the Tenth Circuit, Judge Seymour overturned the trial court, ruling that it did have subject matter jurisdiction over the issues in this case.[178] Relying on *District of Columbia Court of Appeals v. Feldman*,[179] the court stated that a federal district court lacks subject matter jurisdiction over the judicial decisions of a state supreme court when the state court takes on a non-judicial function, such as the promulgation of rules for attorney discipline. However, a federal district court does have jurisdiction to resolve constitutional and other federal issues.[180]

The Tenth Circuit agreed with the district court's rejection of Razatos' argument that where the credibility of a witness is of the utmost importance to a case, it is a denial of due process if the final arbiter of fact does not personally hear the testimony.[181] The court relied on the flexible due process analysis employed by the Supreme Court in evaluating what process is due when liberty or property interests are threatened in other than formal judicial proceedings.[182] Flexible due process requires a three-step inquiry into the nature of the individual interest affected, namely: (1) the risk of the erroneous deprivation of that interest through the challenged procedures; (2) the probable value of any additional procedural safeguards; and, (3) the governmental interest in administrative efficiency.[183] In balancing these interests, the Tenth Circuit relied heavily upon the interpretation of this three-step analysis employed by the Supreme Court in *United States v. Raddatz*.[184]

The *Razatos* court first found that the plaintiff did indeed have a crucial liberty interest in pursuing his profession as a lawyer and was entitled to procedural due process protections.[185] Although the court characterized the attorney disciplinary hearings as "quasi-criminal," because of the possibility of losing one's livelihood, it held that such disciplinary hearings do not require the elaborate procedural protections afforded a defendant in a criminal trial.[186]

The court rejected Razatos' allegations that the Hearings Committee's determinations as to credibility were unreliable and thus presented the risk of erroneous determination.[187] The Tenth Circuit found that review of the Hearings Committee's findings of fact, first by the Hear-

178. 746 F.2d at 1434.

179. 460 U.S. 462 (1983). In *Feldman*, a Virginia attorney attacked the constitutionality of a District of Columbia rule which required completion of law school to qualify for the bar. The Court held that the district court did not have jurisdiction, but only because the rule was "inextricably intertwined" with the state court decision. *Id.* at 486-87.

180. 746 F.2d at 1432-33.

181. *Id.* at 1434.

182. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

183. *Id.* at 335.

184. 477 U.S. 667 (1980). In *Raddatz*, the Court upheld a provision in the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1982), which allowed a district court to use a record developed during a magistrate's hearing to decide a motion to suppress.

185. 746 F.2d at 1435.

186. *Id.* at 1435-36.

187. *Id.*

ings Panel and then by the Colorado Supreme Court, was sufficient evidence that Colorado's procedures adequately guarded against an erroneous determination.[188] The fact that the plaintiff was permitted to file exceptions to the Hearings Panel's report, that the issues were extensively briefed, and that the "clear and convincing evidence" standard of fact finding was employed, bolstered the credibility of the Colorado Supreme Court's final decision. The court also found that, although not expressly provided for in the rules of procedure, the state supreme court retained the power to rehear the case *de novo* if it questioned the report of the Hearings Panel.[189]

Finally, the Tenth Circuit found that the interest in protecting the public from incompetent and corrupt lawyers ranks high among important state interests.[190] The court held that the administrative process, with the present procedural safeguards, served this interest while freeing the state supreme court from the time consuming task of personally developing the record in disciplinary proceedings.[191] Therefore, placing additional fact finding burdens upon the supreme court is unwarranted so long as the court properly exercises its discretion in conducting *de novo* review of the findings of fact in the appropriate circumstances.[192] Razatos' case did not present that set of circumstances.

## V. BALLOT ACCESS: *BLOMQUIST V. THOMSON*

### A. *Facts*

In *Blomquist v. Thomson*[193] the plaintiffs, members of the Wyoming Libertarian Party, brought suit against the defendant in her official capacity as Wyoming Secretary of State, claiming that certain sections of the Wyoming Election Code[194] violated the right of freedom of association and the right to cast votes effectively under the first and fourteenth amendments.[195]

Where fundamental constitutional rights are adversely affected by state law, the state has the burden of proving that the law serves a compelling interest and employs the means least burdensome to those rights in order to serve that interest.[196] Wyoming conceded that the ballot access provisons affected fundamental constitutional rights of the plaintiffs while the plaintiffs conceded that the ballot restriction provisions served legitimate interests of the state.[197] Therefore, the question to be

188. *Id.* at 1436.
189. *Id.* at 1434.
190. *Id.* at 1436.
191. *Id.* at 1437.
192. *Id.*
193. 739 F.2d 525 (10th Cir. 1984).
194. WYO. STAT. §§ 22-1-101 to -26-121 (1977).
195. Blomquist v. Thomson, 591 F. Supp. 768, 769-70 (D. Wyo. 1984).
196. *Id.* at 770; *see* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184-85 (1979) (ballot access restrictions in Chicago could not be stricter than statewide); American Party of Tex. v. White, 415 U.S. 767, 780-81 (1974) (upheld minority party ballot restrictions as meeting compelling state interest).
197. 591 F. Supp. at 774. The state required that a party demonstrate a modicum of

resolved was whether the state had chosen the least restrictive means of accomplishing its goal.

B. *The District Court Decision*

The district court found that the challenged provisions made it impossible for a new political party to get on the ballot within a year of a general election.[198] New parties were put at a distinct disadvantage as compared to the established parties (*i.e.*, the Republican and Democratic parties).[199] The district court held that the election code unduly burdened plaintiffs' rights: "a state's election laws cannot operate to freeze the political status quo."[200] However, because the Wyoming Legislature was in session at the time, the court deferred ordering remedial action, allowing the state to amend its election code.[201]

The district court's major concern was over the fact that a new party had to wait over two years to get on the ballot.[202] The Wyoming Legislature subsequently amended the code to allow a new party seeking ballot access to file a petition by June 1 of any election year, containing the signatures of 8,000 voters, the majority of whom could not be residents of the same county.[203] The parties agreed to a compromise on the signature requirement since the plaintiffs had only two months left to file the petition before the 1984 election.[204] In approving the amended election code, the district court rejected the compromise worked out between the parties for the 1984 election year. The plaintiffs appealed on the grounds that the two-county rule,[205] as well as the 8,000 signature requirement as it applied to the Wyoming Libertarian party in the 1984 election year, were unconstitutional.[206]

C. *The Tenth Circuit Decision*

In analyzing the amended Wyoming Election Code the Tenth Circuit followed the framework set out by the Supreme Court in *Anderson v.*

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support before granting it official recognition. The state sought to avoid frivolous candidacies, expensive run-off elections, and voter confusion from crowded ballots. *Id.*

198. Under the election code, a candidate from a minor party was required to file over two years prior to a general election. In addition, the candidate was required to raise sufficient support in a petition as well as having received ten percent of the vote in the last general election in order to be listed on the ballot as an independent candidate. 591 F. Supp. at 775 n.7.

199. *Id.* at 774. "[W]e must conclude that most of the provisions within the Code assume the existence of a two-party system consisting of Democratic and Republican parties." *Id.*

200. *Id.*

201. *Id.* at 777. The court took judicial notice of the fact that the Wyoming Legislature had returned to session.

202. *See supra* note 198 and accompanying text.

203. 739 F.2d at 526.

204. They compromised at a requirement of 1,333 signatures. *Id.*

205. " 'To be valid, a petition shall contain the signatures of not less than eight thousand (8,000) registered electors eligible to vote in this state, *the majority of whom may not reside in the same county.*' " 739 F.2d at 527 (quoting WYO. STAT. § 22-4-201(d) (1984) (emphasis by the court)).

206. 739 F.2d at 526.

*Celebrezze*.[207] *Anderson* requires a court to weigh the "character and magnitude"[208] of the alleged harm to the plaintiffs' first and fourteenth amendment rights against the interests which the state claims will justify the burden on the plaintiffs' rights.[209]

The court noted that signature limitations by county in ballot access rules had been found in previous cases to be a violation of the principal of voter equality.[210] The Tenth Circuit held that Wyoming's two-county rule fell within this class of ballot access rules which substantially burden individual rights.[211] The court then weighed the state's interests asserted against the burden on the plaintiffs' rights. The court rejected the state's argument that the two-county rule was necessary to discourage fraud or to ensure that the new party had a fairly broad base of support before it was added to the ballot.[212] The state offered no rationale or evidence to support its contention that the rule discouraged fraud. Likewise, the Tenth Circuit found that no compelling interest was served by ensuring that the new party's support was geographically diverse and, therefore, struck down the two-county rule.[213]

Based upon the *Anderson* analysis, the court held that the June 1 deadline was burdensome to the plaintiffs' right of political association because it fell before the most advantageous time to garner support, after the major party primaries, when the major parties have offered their platforms and candidates to the public.[214] The court found that the time constraints placed on this particular party in the 1984 election year were unreasonable. Due to the litigation, the time remaining for the plaintiffs to obtain the requisite 8,000 signatures was severely limited.[215]

The Tenth Circuit stopped short of invalidating the June 1 deadline and never actually addressed the issue of whether the state had a valid interest in requiring 8,000 signatures for a new party to gain ballot access. The court found that because the defendants had earlier agreed to a compromise of 1,333 signatures for 1984 (which the plaintiffs had surpassed)[216] they could not later argue that they had a compelling state interest in requiring 8,000 signatures.[217] This narrow holding was ap-

207. 460 U.S. 780 (1983).

208. 739 F.2d at 525 (quoting *Anderson*, 460 U.S. at 789).

209. 739 F.2d at 525.

210. Moore v. Ogilvie, 460 U.S. 780 (1983) (requirement that independent candidates' petitions include at least 200 signatures from at least 50 of the state's 102 counties discriminates against the more populous counties in violation of equal protection clause); Communist Party v. State Bd. of Elections, 518 F.2d 517 (7th Cir.) (requirement that not more than 13,000 of 25,000 mandatory signatures come from the same county violates the right to vote effectively), *cert. denied*, 423 U.S. 986 (1975).

211. 739 F.2d 528.

212. *Id.* at 529.

213. *Id.*

214. *Id.* at 528.

215. *Id.* at 528-29.

216. *Id.* at 529.

217. *Id.* "We do not see how the State can argue on appeal that it has a compelling interest in plaintiffs meeting the 8,000 signature requirement this year when it specifically

plied only to this particular plaintiff and solely for the purposes of the 1984 election. Although the court expressed strong disapproval of the June 1 deadline, a decision on the constitutionality of that provision awaits future litigation.

## VI. THE SUPREMACY CLAUSE AND RETROACTIVE LEGISLATION UNDER THE DUE PROCESS CLAUSE: *TAXPAYERS FOR ANIMAS-LA PLATA REFERENDUM (TAR) V. ANIMAS-LA PLATA WATER CONSERVANCY DISTRICT*[218]

The Tenth Circuit's decision in *TAR* was an "important and unusual appeal involv[ing] several constitutional issues."[219] The outcome of this case has a potentially enormous effect upon the control of water resources in Colorado.[220]

### A. *Facts*

The Water Conservancy Act[221] was enacted by the Colorado legislature in 1937 to aid in the financing of local water projects.[222] The keystone of this Act was the establishment of water conservancy districts with the power to raise finances through the levy of *ad valorem* taxes.[223]

The Act allowed for the creation of a district by collecting the signatures of twenty-five percent of the irrigated land owners and five percent of the non-irrigated land owners on a petition submitted for approval to the district court for the county in which all or part of the proposed water conservancy district was to be situated.[224] Opponents of the water conservancy district could force a referendum on the issue by filing a petition in the district court opposing the establishment of the district, signed by twenty-five percent of the irrigated land owners and five percent of the non-irrigated land owners.[225]

In 1979, the Animas-La Plata Conservancy District successfully filed a petition with the district court.[226] The plaintiff, Taxpayers for Animas-La Plata Referendum (TAR), concerned about the environmental impact of the project, spent $10,000 in an unsuccessful petition drive.[227] The district court decreed that the Animas-La Plata Conservancy District was officially organized in compliance with the Act.[228]

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agreed below that 1,333 signatures would satisfy that interest due to the shortened time for obtaining signatures." *Id.* at 529.

218. 739 F.2d 1472 (10th Cir. 1984).

219. *Id.* at 1474.

220. *See infra* text accompanying notes 244-46.

221. COLO. REV. STAT. §§ 37-45-101 to -152 (1973 & Cum. Supp. 1985).

222. 739 F.2d at 1474.

223. *Id.*

224. COLO. REV. STAT. § 37-45-109 (1973 & Cum. Supp. 1985). The statute has additional requirements for the minimum number of signatures and a land value and ownership statement.

225. COLO. REV. STAT. §§ 37-45-112(2)(b), (5)(b) (1973).

226. 739 F.2d at 1474.

227. *Id.*

228. *Id.*

The plaintiff then sought to attack the procedures used to create the conservancy district in federal court, alleging that the Water Conservancy Act violated the due process and equal protection clauses of the fourteenth amendment.[229]

Faced with the possibility that every water conservancy district in Colorado would be vulnerable to a similar attack if the Water Conservancy Act was found invalid, the state's legislature expeditiously passed House Bill 1272.[230] The bill retroactively validated and recreated each existing water conservancy district in the state, including Animas-La Plata.[231] In response to the legislature's action, TAR amended its complaint to attack the constitutionality of House Bill 1272.[232] The district court upheld the constitutionality of the bill and, therefore, held that the plaintiff's claims for declarative and injunctive relief were moot.[233] On appeal, TAR renewed its attack on the constitutionality of House Bill 1272. TAR first alleged that the bill violated the supremacy clause of the United States Constitution.[234] They also claimed that the bill constituted retroactive legislation and, as such, was violative of due process.[235]

B. *The Tenth Circuit Decision*

1. The Supremacy Clause

The plaintiff argued that the Colorado legislature's passage of House Bill 1272 was an unconstitutional attempt to defeat the federal court's jurisdiction over a federal question.[236] The Tenth Circuit, Judge Barret writing, reviewed several Supreme Court cases which had found certain state actions to be usurpations of federal court jurisdiction over federal controversies.[237] The court found the instant case easily distinguishable. The Supreme Court cases had all involved attempts by the states to divest the federal courts of their power to adjudicate federal issues.[238] In *TAR*, the Colorado legislature had, in effect, made the

229. U.S. CONST. amend. XIV.

230. COLO. REV. STAT. § 37-45-153 (1973 & Cum. Supp. 1985).

231. 739 F.2d 1475. The court parenthetically observed that an amendment to exclude the Animas La-Plata district from House Bill 1272 was rejected by the legislature.

232. *Id.*

233. *Id.*

234. U.S. CONST. art. VI, cl. 2.

235. 739 F.2d at 1476. TAR also claimed that the bill violated art. II, § 11 of the Colorado Constitution which prohibits laws with retroactive operation. For the purposes of this article, the state constitutional claims will not be addressed.

236. 739 F.2d at 1475.

237. *See, e.g.*, General Atomic Co. v. Felter, 434 U.S. 12 (1977) (state court injunction barred bringing suit in federal court); Donovan v. City of Dallas, 377 U.S. 408 (1964) (state court injunction barred appeal to a federal court); Harrison v. St. Louis & San Francisco R.R., 232 U.S. 318 (1914) (state law revoked charter of railroad which asserted diversity of citizenship to remove suit to federal court); Sterling v. Constantin, 287 U.S. 378 (1914) (Governor of Texas declared martial law in order to restrain production of oil well); United States v. Peters, 9 U.S.(5 Cranch) 115 (1809) (state refused to honor admiralty court judgment reversing state admiralty court).

238. *See, e.g., General Atomic*, 434 U.S. 12; *Donovan*, 377 U.S. 408. In both cases the state court enjoined litigants from bringing an action in federal court.

plaintiff's cause of action moot.[239] There was no effort to remove the case from the federal court's jurisdiction. Indeed, the district court had exercised its jurisdiction by dismissing the action on the ground that the plaintiff's claim, in light of House Bill 1272, no longer presented a justiciable "case or controversy."[240] Relying on *Kremens v. Bartley*[241] and *Hall v. Beals*,[242] the court held that in remedying the unconstitutional characteristics of existing legislation, state legislatures may moot existing law suits.[243]

2. Due Process-Retroactive Legislation

The plaintiff's retroactive legislation claim was based on the theory that its right to litigate this claim had been denied by the legislature's action. Relying on Supreme Court decisions that stress the importance of vesting rights in retroactive legislation claims,[244] the Tenth Circuit denied TAR's due process claim as well. While the courts will not tolerate legislative interference with a fully adjudicated right, legislation that moots pending claims and thereby eradicates accrued rights of action has been upheld by the Supreme Court.[245]

The court held TAR's claim "inchoate" and, therefore, an insufficient basis upon which to challenge an otherwise valid statute.[246] In so doing, the Tenth Circuit avoided a decision which might have resulted in a revolution in the development of Colorado's water resources. Unless the legislature amends the Water Conservancy Act, however, it will be faced with passing legislation to validate each new district through "reenactment" or face the possibility of a legion of future lawsuits like *TAR*.

*John McCarthy*

239. 739 F.2d at 1476. The court noted that even had the legislature intended to moot TAR's suit, the bill was not in violation of the supremacy clause.

240. U.S. CONST. art. III, § 2.

241. 431 U.S. 119 (1977) (voluntary commitment to mental hospital of minor children by their parents mooted by change of statute).

242. 396 U.S. 45 (1969) (Colorado voting residency requirement changed from six months to two months, mooting claim).

243. 739 F.2d at 1476.

244. FHA v. Darlington, Inc., 358 U.S. 84 (1958) (amendment to Veterans' Emergency Housing Act of 1945); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937) (Act affirmed Secretary of State's power to regulate shipping); Graham v. Goodcell, 282 U.S. 409 (1931) (amendment to Internal Revenue Act); Hodges v. Snyder, 261 U.S. 600 (1923) (consolidation of school district validated by legislation).

245. 739 F.2d at 1477 (citing *Graham*, 282 U.S. 409 (1931); Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911); McCullough v. Virginia, 172 U.S. 102 (1848).

246. *Id.*